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No. 91-1102

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

CHEZ SEZ III CORP., a corporation of the State of New Jersey, and JACK CHESNER,

Petitioners,

vs.

TOWNSHIP OF UNION, a political subdivision of the State of New Jersey, and SALVATORE J. MAURO, Construction Official of the Township of Union, in his official capacity,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the unreviewed administrative interpretation of an ambiguous provision of a municipality's zoning ordinance by the municipality's Zoning Board of Adjustment is sufficient to "settle" an issue of state law for *Pullman* abstention purposes where the Zoning Board of Adjustment has been specifically delegated responsibility for giving authoritative interpretations of local zoning ordinances by the New Jersey Legislature. That is, whether in these circumstances, an administrative interpretation of a facially ambiguous ordinance will remove the ambiguity for *Pullman* purposes.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

January 25, 1985: Petitioners applied for a permit for proposed

alterations and received same from respondent, Mauro.

March 5, 1986: Construction completed and Mauro issued Certificate of Occupancy for pre-existing retail use.

November, 1986: Mauro issued summons after discovering that petitioners had added twelve viewing booths after issuance of the Certificate of Occupancy.

March 3, 1987: Summons dismissed in Municipal Court to allow petitioners to file action in the Superior Court of New Jersey, Law Division, Union County.

July 29, 1987: Petitioners filed complaint in the Law Division appealing Mauro's decision that there was an extension of a preexisting non-conforming use by the addition of the viewing booths. Petitioners also included a claim dealing with 42 U.S.C. § 1988.

August 17, 1988: Claim under 42 U.S.C. § 1988 dismissed with prejudice by parties' stipulation.

November 18, 1988: Oral argument before Honorable Edward W. Beglin, Jr., Assignment Judge for Union County who entered judgment in favor of respondents and against petitioners.

December 7, 1988: Petitioners filed notice of appeal to the Superior Court of New Jersey, Appellate Division, challenging the ruling made by Judge Beglin.

September 29, 1989: Oral argument before the Appellate Division of the Superior Court.

October 19, 1989: The Appellate Division affirmed the judgment entered in the court below.

February 1, 1990: Upon the appeal filed by petitioners which challenged the decision made by Mauro, the Union Township Construction Board of Appeals directed that petitioners were to file an application with the Union Township Zoning Board of Adjustment for a use variance, site plan approval and interpretation of the Land Development Ordinance.

June 4, 1990: Petitioners filed a request for interpretation of the Ordinance with the Union Township Zoning Board of Adjustment.

August 1, 1990: Public meeting held by the Zoning Board of Adjustment on petitioners' request for interpretation of the Land Development Ordinance.

September 5, 1990: The Zoning Board of Adjustment adopted a resolution by a 6-0 vote concluding that the use of the video booths was not a permitted use on these premises.

October 29, 1990: Petitioners filed an appeal from the September 5, 1990 resolution of the Zoning Board of Adjustment with the Superior Court of New Jersey, Law Division, Union County. That appeal is still pending and has not been heard nor has a decision been rendered.

September 17, 1990: [Note: to assure smooth flow of events the following dates are known to be out of strict chronological order]. Mauro issued an order to the Chief of Police to require that use of the video booths cease and desist. That order was served upon petitioners' employee and the portion of the building where the booths were located was sealed off. The balance of the premises where retail use was carried on was left untouched.

October 1, 1990: The U.S. District Court for the District of New Jersey issued an order to show cause returnable on October 11, 1990 to Mauro and the Township of Union as to why temporary restraints should not issue.

October 11, 1990: After oral argument and review of briefs filed by the parties, Honorable Dickinson R. Debevoise, U.S.D.J. in Newark, New Jersey denied petitioners' request for restraints and ordered hearing on their complaint set down for October 17, 1990.

October 17, 1990: Judge Debevoise rendered his opinion exercising his discretion in applying the *Pullman* doctrine. [Pa 19a].

October 24, 1990: Petitioners filed Notice of Appeal with the U.S. Court of Appeals for the Third Circuit.

April 3, 1991: Oral argument was heard by the Third Circuit court.

September 24, 1991: Decision was rendered by the Third Circuit court affirming the District Court opinion. [Pa 1a].

January 6, 1992: Petition for writ of certiorari served upon the respondents' attorney.

B. Statement of Facts.

This is a zoning case in which petitioners failed to exhaust administrative remedies pursuant to Rule 4:69-5 of the Rules Governing the Courts of the State of New Jersey.

On or about January 25, 1985, petitioners submitted an application for a building permit to defendant Salvatore J. Mauro, Construction Official of the Township of Union. At the same time, petitioners filed an Architect's plan made by John P. DePalma, Architect, dated January 25, 1985, indicating proposed "alterations to East Building, 1521 Route 22, Union, New Jersey." The application made by petitioners indicated that the proposed alterations were to divide open space into three offices or sales units with toilets. The specific use was represented by petitioners to be *retail sales*, a permitted use in this zoning district.

Upon completion of the construction, inspection was made and a Certificate of Occupancy was issued by defendant Salvatore J. Mauro, Union Township Construction Official, (hereafter "Mauro"), on or about March 5, 1986.

On or about August 25, 1986, Thomas H. Stauch, a prospective tenant, made an application to Mauro for a Certificate of Continued Occupancy to operate a clothing store on the vacant second floor of the premises. Mauro and various subcode officials conducted inspections of the premises. Certain recommendations were made by the subcode officials as a result of these inspections. These recommendations were made by the subcode officials so that the premises would comply with the Township Building Code. They included installation of toilets on the second floor, a roof to be installed over the exterior stairway from the second floor to the ground and a railing modification required by the fire subcode official.

Inspection by Mauro of the first floor area occupied by petitioners disclosed that booths and partitions were installed and constructed which were not originally indicated on the plans filed by petitioners with Mauro. Said booths were, in effect, small rooms with solid floor to ceiling doors.

On October 24, 1986 Mauro wrote to the owner of the property, Mr. William Untracht advising that petitioners had added a new use to the premises which required additional off-street parking. Petitioners received a copy of that letter also. Because of violations cited by Mauro pursuant to various Township of Union Ordinances attributed to petitioners, Mauro was required to deny Stauch the Certificate of Continued Occupancy and refunded the fee paid by Stauch. Petitioners ignored Mauro's requests that all violations of the Land Development Ordinance and Building Code cease. Because occupancy of the premises was a violation of the Township of

Union Land Development Ordinance and Building Code, Mauro caused a Summons to be issued in Municipal Court of Union against petitioner Jack B. Chesner on or about November 25, 1986.

On or about March 3, 1987, said Summons was dismissed by the Union Township Municipal Court with the consent of the respondents to allow petitioners to file action in Superior Court, Law Division of New Jersey, Union County.

On or about July 29, 1987 petitioners filed their complaint alleging a variety of claims including a constitutional claim for compensatory damages and attorney fees pursuant to 42 U.S.C. § 1988. Said claim was dismissed by petitioners, with prejudice, and a Stipulation of Dismissal was filed on August 17, 1988. What remained of the original complaint, therefore, was simply a zoning case.

Petitioners have added to, or converted the use of, the premises on the first floor after issuance of the Certificate of Occupancy without first obtaining approval and/or a permit to do so. Such action violated the Land Development Ordinance and Building Code of the Township of Union. Petitioners never made application to the Zoning Board of Adjustment of the Township, nor had they applied to the Planning Board of the Township for site plan approval despite the extending of the original use from retail to a place of entertainment.

Petitioners, by change of use and occupancy from the original application for retail use, failed to comply with the parking requirements of the Township of Union Land Development Ordinance and failed to exhaust any administrative remedy such as application for variance to the Township of Union Planning Board or to the Township of Union Board of Adjustment.

On October 27, 1988 respondents moved for dismissal of

petitioners' Complaint for failure to exhaust administrative remedies pursuant to R.4:69-5. On November 18, 1988 oral argument by telephone was held before the Honorable Edward Beglin, Jr., A.J.S.C. Counsel for both parties were given the opportunity to present oral arguments in addition to briefs previously filed, at which time the court upon examination and deliberation ruled in favor of respondents' motion dismissing petitioners' Complaint.

The court found that petitioners did in fact fail to exhaust administrative remedies. It determined that the proper and appropriate setting of this matter lay with a quasi-judicial body, *i.e.*, the local board of adjustment, whose own expertise and knowledge in the area is particularly equipped to address and grant the relief sought by the petitioners.

On December 7, 1988 petitioners filed a Notice of Appeal with the Superior Court of New Jersey, Appellate Division. Respondents moved for summary disposition to dismiss petitioners' appeal pursuant to R. 2:8-3(b), in that there was no genuine issue remaining as to any material fact, and respondents were entitled to their judgment as a matter of law. The Appellate Division decided that the ruling of the lower court was correct and affirmed.

On October 1, 1990, the United States District Court for the District of New Jersey issued an Order to Show Cause returnable on October 11, 1990. Briefs were filed and oral argument was held before Honorable Dickinson R. Debevoise, U.S.D.J. in Newark, New Jersey, and the matter was set down for hearing on petitioners' complaint for October 17, 1990. At that time, Judge Debevoise rendered his opinion. (PA 19a).

That decision was appealed by petitioners to the United States Court of Appeals for the Third Circuit. Oral argument was heard

on April 3, 1991 and the Court's opinion was filed September 24, 1991. (PA 1a). Petitioners seek review of the opinion rendered by the United States Court of Appeals for the Third Circuit.

Beglin, Jr., A.J.S.C. Counsel for both parties were given the opportunity to present oral arguments in addition to briefs previously filed, at which time the court upon examination and deliberation ruled in favor of respondents' motion dismissing petitioners' Complaint.

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Court of Appeals for the Third Circuit. Oral argument was heard on April 3, 1991 and the Court's opinion was filed September 24, 1991. (PA 1a). Petitioners seek review of the opinion rendered by the United States Court of Appeals for the Third Circuit.

SUMMARY OF ARGUMENT

The respondents respectfully submit that this is not a case which meets this Court's criteria for the granting of a petition for certiorari, and more importantly, the case was correctly decided by the several courts below as recited in the Statement of the Case, Paragraph A. Course of Proceedings and Disposition in the Courts Below.

The District Court finding that the Zoning Ordinance of the Township of Union was amenable to a construction by the state courts which would obviate the need for federal adjudication was sustained by the Third Circuit. In fact, petitioners have chosen such a route by filing an appeal of the Zoning Board's decision by an action in lieu of prerogative writ with the Superior Court of New Jersey, Law Division, Union County. In effect this action by petitioners will allow the state court to rule in the first instance upon proper interpretation of the Zoning Ordinance.

With reference to the doctrine set forth in *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S. Ct. 643, 85 L.Ed. 971 [1941], the special circumstances were determined to have been met by the District Court and the Third Circuit.

The fact remains is that the District Court has the power to make a *discretionary* determination as to whether to abstain or not. This case is somewhat fact sensitive. The Zoning Board of Adjustment found as a fact that the video booths were a separate and distinct use from the permitted retail use; the petitioners argue that the video booths were included within the

definition of a "retail shop". The District Court found that either of the positions held by the parties was plausible and therefore the language of the ordinance was ambiguous on its face.

The District Court and the Third Circuit found that the case at bar typically was the kind that triggered *Pullman* abstention. Those courts correctly found that an interpretation by the state court would obviate the need for or substantially narrow the scope of the constitutional issues. Therefore the second factor to be considered in applying the *Pullman* doctrine was found to have been met.

Land use issues are an area of particularly local concern involving state and local law. An erroneous federal court decision would be disruptive of important state policies as found by the District Court and Third Circuit, both of which concluded that the third *Pullman* prerequisite was met.

Finally, the Third Circuit found that the District Court did not abuse its discretion in abstaining pursuant to the *Pullman* doctrine.

This is not an appropriate case for the granting of the petition for certiorari and we respectfully pray that this Court deny the writ.

REASONS FOR DENYING THE WRIT

POINT I.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE PETITIONERS FAIL TO MEET THE CRITERIA OR CONSIDERATIONS FOR THE GRANTING OF A WRIT OF CERTIORARI AS SET FORTH IN RULE 10.

This is a fact-bound case not appropriate for plenary review.

In addition, the facts and circumstances of this case meet none of the criteria or considerations for the granting of a writ of certiorari in this Court as set forth in Rule 10 of this Honorable Court. While respondents recognize that the considerations set forth in Rule 10 are neither controlling nor exhaustive, respondents respectfully submit that they are clearly indicative of the fact that this Court should not grant the petition for the writ of certiorari in this case.

As stated in Rule 10.1 of the Rules of the Supreme Court of the United States, "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor . . ." Petitioner here has certainly shown no "special and important reasons" for the granting of the writ in this case.

There has been no showing by petitioners that the decision of the United States Court of Appeals for the Third Circuit is in conflict with other United States Courts of Appeal on the same subject matter; nor has there been a showing that the Third Circuit Court's decision is in conflict with a decision by a state court of last resort; nor has there been a far departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Petitioners fail to cite an opinion of a state court of last resort which decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals.

Petitioners have not presented this Court with an important question of federal law which has not, but should be, settled by this Court, or that the Third Circuit has decided a federal question in a way that conflicts with the decisions of this Court.

Indeed, the petitioners have presented a question of interpretation of a local zoning ordinance which is presently filed and pending in the Superior Court of New Jersey, Law Division, Union County, a court which is uniquely and better able to render a proper decision in such a local zoning case.

For the foregoing reasons, the respondents respectfully pray that this Court deny the petition; the case involves no questions of law which merit this Court's granting the petition for certiorari.

POINT II.

THE PETITION FOR CERTIORARI SHOULD BE DENIED BECAUSE THE DECISION OF THE LOWER COURTS DO NOT CONFLICT WITH THE DECISIONS OF THE NEW JERSEY SUPREME COURT.

The Third Circuit court noted that the leading case of *Belleville v. Parrillo's, Inc.*, 83 N.J. 309 decided by the New Jersey Supreme Court stands for the proposition that a nonconforming use cannot be expanded to include other types of uses. The Supreme Court found to be dispositive the trial court's test which stated that "a disco is a place wherein you dance and a restaurant is a place wherein you eat. It is as simple as that." So we have here the same situation: a retail shop is where you purchase articles and a movie is where you sit to be entertained. It is as simple as that.

Further, the New Jersey Supreme Court let stand the decision of the Appellate Division of the Superior Court in *Cos-Lin, Inc. v. Spring Lake Board of Adjustment et als*, 221 N.J. Super. 148, *cert. denied*, 110 N.J. 201. The issue in this case was whether changing a seasonal restaurant and hotel in a residential zone to a year-round operation was an illegal extension of the prior

nonconforming use existing for some 30 years. The *Cos-Lin* court reviewed the history of prohibition of extending non-conforming uses in New Jersey. The court held that the temporal extension was an illegal extension of the prior non-conforming use.

There are collections of cases from other states which are cited in *Cos-Lin*, specifically referring to such leading texts as *Rathkopf, The Law of Zoning and Planning*, 51.07 (*see also* xx 51.02 and 51.04); 8A *McQuillan, Municipal Corporations; Anderson, American Law of Zoning; Powell, Real Property; Williams, American Land Planning Law.*

The spirit of the New Jersey case and statute law is that extension of a prior non-conforming use without permission is prohibited; and that spirit is fostered by the belief that such prohibition will eventually cause the non-conforming use to become abandoned or conforming.

There is no merit in the petitioners' argument that the decisions below are inconsistent with the decisions of this Court. There is no genuine constitutional issue for decision by this Court. The petitioners misstate the issue involved. This is not a constitutional question, it is a zoning case, and as such the courts below, both State and Federal, were correct in their holdings. The petitioners could have easily avoided this journey through the systems had they simply made an application for relief under the *Municipal Land Use Law of New Jersey, N.J.S.A. 40:55D-1 et seq.* to the Zoning Board of Adjustment. We are years later and still they have never taken the first and most elementary step.

CONCLUSION

This case meets none of the Court's criteria for the granting of the writ of certiorari. It is a zoning case best decided by the courts of the State of New Jersey. The petitioners have had their "day in court", in fact several days in several courts. For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

DAVID B. ZURAV
Attorney for Respondents